

(I)

AUGUSTINE NUGENT, Esq; *Appellant.*

ROBERT POWER, and
 MARY his Wife; and
 EDMUND MANDEVILLE, and ELLEN
 his Wife;

Respondents.

The Respondents CASE.

25th of March, 1675.
 Mortgage to Old-
 field, for 200 l.

JOHN NUGENT, the *Appellant's* late Father, being seized in Fee of Lands of a considerable yearly Value in the County of *Waterford*, did, by Indenture of Feoffment, bearing Date the 25th Day of *March*, 1675, convey the Lands of *Deelis* and *Nugents Burgery* in that County, unto *James Oldfield* since deceased, and his Heirs, for securing the Payment of Two hundred Pounds with Interest, after the Rate of 10 per Cent. per Annum.

THE said *James Oldfield* died in the Year 1688, having first made his last Will in Writing, and thereby devised Two Third Parts of the said Mortgage-Money to *William Oldfield*, his eldest Son and Heir, and the other Third Part to *Mary Oldfield* his Wife, and of his said Will appointed the said *William Oldfield* sole Executor.

30th of April, and
 1st of May, 1688.
 Mortgage to Nagle
 for 250 l.

THE said *John Nugent*, in Consideration of Two hundred and fifty Pounds lent him by *William Nagle* since deceased, did, by Indentures of Lease and Release, bearing Date respectively the 30th Day of *April*, and 1st Day of *May*, 1688, convey the said Lands of *Deelis* and *Nugents Burgery*, together with some other Lands in the said County of *Waterford*, to the said *William Nagle* and his Heirs, subject to Redemption, on Payment of the said Two hundred and fifty Pounds with Interest, after the Rate of 10 per Cent. per Annum.

7th of December,
 1699. Agreement to
 reduce Interest.

By a Deed mutually executed by the said *William Nagle* and *John Nugent*, bearing Date the 7th Day of *December*, 1699, the said *William Nagle* consented to accept of Interest after the Rate of 8 per Cent. per Annum (instead of 10 per Cent.) for the said Two hundred and fifty Pounds, during such Time as the said *Nagle* should be pleased to leave the said principal Money in the Hands of the said *John Nugent*; but on the said *Nagle's* giving six Months Notice in Writing of his Intentions to call in the said Principal Money; then, if not paid, the said Deed or Agreement was to be void, and the Mortgage-Money to carry Interest, according to the Deed of Mortgage.

29th and 30th of Ja-
 nuary, 1699. Wil-
 liam Oldfield's As-
 signment of the 200 l.
 Mortgage to Bradley.

THE said *William Oldfield*, the Heir and Executor of the said *James Oldfield* (the original Mortgagee) did, by Indentures of Lease and Release, for valuable Considerations (and particularly in Consideration of the said *Bradley's* taking upon him to pay all the just Debts of the said *William Oldfield*) assign the said Two hundred Pounds Mortgage, and the mortgaged Premises, to *James Bradley*, and his Heirs.

THE said *John Nugent*, hearing that the said Mortgage was assigned to *Bradley*, treated with him for an Assignment or Release thereof; whereupon the said *Bradley* agreed, in Consideration of Two hundred Pounds, to release his Estate and Interest therein to the said *John Nugent*, and accordingly some such Release was prepared; but the said *Nugent*, not having the Money then to pay, and making some Demands on the said *William Oldfield* for Corn, alledged to have been taken from him by *Oldfield* in the late Wars of *Ireland*, the said *Nugent* and *Bradley* agreed to submit the Matter to the Decision of certain Arbitrators, and they mutually executed Bonds of Arbitration for that Purpose; whereupon the said Release was delivered unto one *Edmund Nugent*, a near Relation and Neighbour of the said *John Nugent*, as an Escrow to take Effect as *Bradley's* Deed, when an Award should be made by the said Arbitrators, and when the Consideration Money, in the said Release mentioned, should be paid to the said *Bradley*; neither of which was ever done.

1st of March, 1699.
 Nugent's Letter to
 Nagle.

THE said *John Nugent*, wanting Money to pay off *Bradley*, applied himself to the said *William Nagle* for the Loan of the further Sum of Two hundred and fifty Pounds, to make up the whole Five hundred Pounds; and, by Letter dated the 3d of *March*, 1699, desired *Nagle* to remit him Ninety Pounds from *Dublin* with all Speed, and to keep the rest in his Hands, till the said *Nugent* could go to Town, and perfect Securities for the whole, and offering his Bond, as a Security in the mean time for the Ninety Pounds; on Receipt of which Letter, the said *Nagle*, by his Letter of the 7th of *March*, 1699, informed *John Porter*, late of *Waterford*, Esq; his Council at Law, that he intended to advance or lend a further Sum of Two hundred Pounds to the said *Nugent*, but thought he could not safely do it, without having an Assignment of *Oldfield's* Mortgage; and therefore he desired the said Mr. *Porter* to draw a proper Assignment, adding, that he directed the said *Nugent* to lodge the same in his the said *Porter's* Hands, in Trust, till he the said *Nagle* should pay the remaining Part of the Two hundred Pounds.

1st of March, 1699.
 John Nugent's Let-
 ter to Mr. Porter.

THE said *John Nugent* informed the said Mr. *Porter*, by Letter of this Date, that he had sent *Bradley* with the Mortgage-Deed, in order to have an Assignment thereof made to the said *Nagle*, which Assignment he desired the said *Porter* to keep in his Hands, till *Nagle* and he had settled Matters between them, and not to give up the same, without his the said *Nugent's* Direction.

ACCORD-



19th and 20th of
March, 1699. Brad-
ley's Assignment to
Nagle.

ACCORDINGLY the said *Bradley*, by Deeds of Lease and Release, in Consideration of Two hundred Pounds therein mentioned, to be paid to him by the said *Nagle*, conveyed the said first mortgaged Premises to the said *Nagle* and his Heirs, subject to the Proviso of Redemption in the Original Mortgage-Deed, to which Assignment the said *John Nugent* was a subscribing Witness.

THE said *John Nugent* thereupon wrote to *Nagle*, informing him that *Bradley* had executed the Assignment, which he said was left in Mr. *Porter's* Hands, till they could settle Matters between themselves, and desiring the said *Nagle* to remit him Twenty Pounds in the same manner as he had sent him Thirty Pounds before.

26th of June, 1700.
Nugent's Direction
to *Porter*, to deliver
Assignment to *Nagle*.

THE said *John Nugent* soon after went to *Dublin*; and all Matters being there settled between him and the said *Nagle*, he, by an Instrument or Writing under his Hand and Seal, directed the said Mr. *Porter* to deliver the said Assignment, and all other Writings relating thereto, to the said *Nagle*, or his Order; and thereby acknowledged, that all Matters were adjusted and settled between them to their mutual Satisfaction.

IN the said Year 1700, there was another Deed or Instrument mutually executed by the said *Nagle* and *Nugent*, for reducing the Interest of the said Two hundred Pounds Mortgage, of the same Tenor, or to the same Effect, with that concerning the Two hundred and fifty Pounds: But the said *Nagle* afterwards, by a Writing under his Hand and Seal, dated the 3d of *July*, 1702, desired the said *John Nugent* would in six Months pay in the principal Sum of Four hundred and fifty Pounds, due on both the said Mortgages, and signified, that on Failure he would insist on Interest for the same after the Rate of 10 per Cent. pursuant to their Agreement.

THE said *William Nagle* received the Interest of the said respective Mortgages till his Death, which happened in 1702, when he died intestate, and without Issue; whereupon the Administration of his Goods was granted to *Phillis Gough*, his only Sister and Heir at Law, and to *Michael Gough* her Husband, in her Right, who constantly received the Interest of the said respective principal Sums of Two hundred and fifty Pounds, and Two hundred Pounds, after the Rate of 8 per Cent. (they not having insisted on the said Notice given by *Nagle*) from the said *John Nugent* till his Death, which happened in 1714, and after his Decease, from the Appellant, till November, 1718, as appears by Accounts from Time to Time stated, touching the same.

THE said *Phillis Gough* died in 1719, leaving the Respondents, *Mary* and *Ellen*, her only Children and Coheirs at Law; and the said *Michael Gough*, by Deed bearing Date the 2th Day of *January*, 1719, granted and assigned the said Mortgaged Premises, and all his Right, Title and Interest in the said Mortgages to the Respondents.

THE said Release given by *Bradley*, and deposited with the said *Edmund Nugent* in 1699, was in 1716 delivered by him to the Appellant; who was so far from thinking it a Discharge of the said Two Hundred Pounds Mortgage, or of any Validity whatsoever, that he continued to pay the Interest of the said Sums of Two hundred and fifty Pounds, and Two hundred Pounds, till November, 1718, as aforesaid: But afterwards refused to pay the same, on Pretence that the said Release so given as an Escrow, on Trust to attend the Event of the Arbitration, was an absolute Bar, and Discharge of the said Mortgage for Two hundred Pounds.

1721.
Respondents Bill.

THE Respondents exhibited their Bill in the Court of Chancery of Ireland against the Appellant the said *Edmund Nugent*, *James Bradley*, and others, setting forth the Matters herein before-mentioned; and further setting forth, that the Assignment from *William Oldfield* to *Bradley* was in the Possession of the Appellant, or some of his Confederates, so that the Respondents could not make out a Title at Law; and praying proper Relief, and that the mortgaged Premises, or a competent Part thereof, might be sold to pay them the Principal, and Interest due on the said several Mortgages.

1722.
Appellant's Answer.

THE Appellant, in his Answer to the said Bill, admitted, That the said several Mortgages and Assignments were duly executed; that the Interest of the said several Sums of Two hundred and fifty Pounds, and Two hundred Pounds, was all along paid by his Father, and by him, as herein before set forth; and that no Award was ever made, pursuant to the said Bond of Arbitration; but insisted, that by a Settlement pretended, or alledged to have been made, on the Marriage of his Father and Mother, previous to the said Mortgages, the said *John Nugent* was made bare Tenant for Life; and consequently (as he insisted) had no Power to make any of the said Mortgages: And he also insisted on the said Release, and that the Two hundred and fifty Pounds Mortgage had been paid off, by the said *Gough's* wrongful receiving the Interest of the Two hundred Pounds; and the said *Edmund Nugent*, in his Answer, confessed, That by the mutual Consent of the said *John Nugent* and *James Bradley*, he kept the said Release in his Hands till after the said *Nugent's* Death.

AND the said *Bradley*, in his Answer, said, That no Award having ever been made, pursuant to the said Bonds of Arbitration, and he having never received one Penny Consideration for executing the said Release, he, with the said *John Nugent's* Consent, in Consideration of Two hundred Pounds, assigned to *Nagle* as aforesaid; and that he directed the said *Nagle* to pay to the said *John Nugent* Sixty-six Pounds, thirteen Shillings, and four Pence, being a Third Part of the said Two hundred Pounds, to be by him paid over to the said *Mary Oldfield*, pursuant to her said Husband's Will; which was accordingly done.

THE Appellant, to harass and delay the Respondents, exhibited two Cross-Bills, one after another, against them, which were dismiss'd with Costs, for want of Prosecution; and in May, 1724, after the original Cause had been at Issue, and a Commission taken out to examine Witnesses, he filed another Bill against the Respondents, and several others, for a Discovery of certain Articles by him pretended to have been made on the Marriage of his Father and Mother; but did not mention the Settlement insisted upon in his Answer to the original Bill; which Cross-Bill the Respondents immediately answer'd; and said, that they neither knew or believed, that *William Nagle*, at the Time of the making or assigning of the said Mortgages to him, had any Notice of the said pretended Articles; and that they did not believe any such Articles were ever executed by the said *John Nugent*; and denied all the Equity charged in the said Bill.

THE

10th of Febr. 1724.
Conditional Decree.

THE *Appellant*, on the 10th of *November*, 1724, after the original Cause was set down to be heard, moved that the Hearing thereof might be put off till all the Defendants in the Cross-Cause had answer'd, and till both Causes could come on together; which, after so much Vexation and Delay, was thought unreasonable; and therefore refused: And the original Cause coming on to be heard, on the 4th of *February* following, the *Appellant* did not think fit to make any Defence, but suffered a conditional Decree to be pronounced against him.

1st of April, 1725.
Issue directed.

THE said Cause afterwards coming to be further heard in the said Court of *Chancery*, and the *Appellant* appearing by his Counsel, it was, on full Debate, order'd that the then *Plaintiffs* (now *Respondents*) should bring an Ejectment against the Defendant *Nugent*; and that he should admit the legal Estate of the said Lands to be in the Plaintiffs, by Virtue of the said Mortgages; but the Defendant (now *Appellant*) was to be at Liberty to prove, if he could, that the said *John Nugent* was but Tenant for Life when the said Mortgages were made; which Issue was to be tried at the then next Assizes at *Waterford*, and on the Judge's Certificate of the Verdict, such further Order would be made as should be fit.

THE *Appellant*, on the 10th of *May*, 1725, moved for a Commission to examine Witnesses in the Cross-Cause in Term-Time, which was granted; but he was not to examine any of the Witnesses examined in the original Cause, or to any Points that were in Issue in that Cause.

THE *Respondents* accordingly brought their Ejectment; but at the Trial, the *Appellant*, to create further Trouble, Expence, and Delay, refused to confess Lease, Entry, and Ouster; so that the *Respondents* were obliged to suffer themselves to be Non-suited.

Lent Assizes, 1726.
Verdict.

THE *Appellant* being indulged so far, as to have a new Trial allowed him, the said Issue was tried at the *Lent-Assizes*, held for the County of *Waterford* in 1726, when the *Appellant* produced, and attempted to prove, a Settlement pretended to have been made on his Father's Marriage with the *Appellant's* Mother, in the Year 1667, whereby his said Father was made strictly Tenant for Life; but the said pretended Settlement appear'd with so many visible Marks of Forgery, that the Jury, by the Judge's Direction, without quitting the Bar, found a Verdict for the *Respondents*.

ON the 3d of *July*, 1725, the Depositions taken for the *Appellant* in the Cross-Cause, were quash'd, on Affidavit of an Irregularity committed by the *Appellant's* Commissioner, and the Clerk who ingrossed them; but the *Appellant* was indulged so far, as to have Liberty to take out a new Commission, which he accordingly did, and examined his Witnesses by Virtue thereof.

10th of June, 1726.
Hearing on Judge's Certificate.

MR. Justice *Parnell*, before whom the said Issue was tried, having certify'd to the Court of *Chancery*, that a Verdict was found for the *Respondents*, the said Cause came on to be heard before the Right Honourable the late Lord Chancellor *West*, on the Equity reserved the 28th Day of *June*, 1726; when his Lordship was pleased to decree, that it should be referred to Mr. *Lyndon*, one of the Masters of the said Court, to state and settle an Account between the *Respondents* and the *Appellant*, on the said several Mortgages, for Principal, Interest, and Costs; on which Account all Parties were to have all just Allowances, and the Master was to be armed with a Commission, to examine such Witnesses as should be produced before him; and the Parties were to be at Liberty to examine each other on Personal Interrogatories: And on Return of the Master's Report, such further Order was to be made as should be fit.

30th of Aug. 1727.
Report.

MR. *Lyndon* dying, the said Reference was transferred to *Walter Stephens*, Esq; who, on the 30th of *August*, 1727, made his Report, and thereby certify'd, that there was due to the *Respondents*, for Principal, Interest, and Costs, on both the said Mortgages, from the 1st of *November*, 1718, since which Time no Interest was paid, to the 1st of *May*, 1727, the Sum of Seven hundred and sixty Pounds, fifteen Shillings, and six Pence.

ON the 31st of *August*, 1727, it was order'd, That the said Report should be confirm'd, unless, in eight Days after Personal Service thereof on the *Appellant*, good Cause were shewn to the contrary; but the *Appellant*, to avoid being served therewith, having absconded, and he or his Servants having shot at a Person who endeavoured to serve him with the said Report at his Dwelling-House, the Lord Chancellor, upon the *Respondents* Application, order'd that Service thereof on the *Appellant's* Clerk in Court should be deemed good Service; whereupon the *Appellant* took two Exceptions to the said Report; 1. For that (as he pretended) the Master ought to have reported, that it appear'd, by the said Release executed by *Bradley*, that the Two hundred Pounds Mortgage was paid off by *John Nugent*, and not by *William Nagle*; and, 2. Because the Master did not apply all the Money, received as Interest of the Two hundred Pounds, towards Discharge of the Two hundred and fifty Pounds Mortgage, which (as he also pretended) would have over-paid the same; which Exceptions being argued the 2d Day of *March*, 1727, before the Right Honourable the present Lord Chancellor of *Ireland*, the same were over-ruled, and the Report confirm'd: And the Register having computed the Interest of the said principal Sums of Two hundred Pounds, and Two hundred and fifty Pounds, from the Time of the Report to that Day; and having added it to the said Sum of Seven hundred and sixty Pounds, fifteen Shillings, and six Pence, reported due by the Master, the Whole amounted to Seven hundred and ninety Pounds, fourteen Shillings, and eight Pence Halfpenny.

1st of March, 1727.
Final Order.

THE said Cause coming afterwards to be heard on the said Report, and Merits, it was decreed, That the *Appellant* should pay to the *Respondents* the said Sum of Seven hundred and ninety Pounds, fourteen Shillings, and eight Pence Halfpenny, with Interest, from the said 2d Day of *March*, in three Months; or, in Default thereof, that the mortgaged Premises, or a sufficient Part thereof, should be sold by the Master to the best Bidder: And that the said Master should, out of the Money arising by such Sale, pay the *Respondents* the said Sum of Seven hundred and ninety Pounds, fourteen Shillings, and eight Pence Halfpenny, with Interest, from the said 2d Day of *March*, 1727, to the Time of Payment; together with their Costs at Law, and in Equity; and should pay the Overplus (if any) to the *Appellant*: And that the *Appellant* should join in proper Conveyances to the Purchaser.

THE *Appellant*, at the Close of the last Session, appealed to your Lordships against the said several Orders or Decrees, and Proceedings on the following Pretences; 1. Because the said *John Nugent* was (as he pretends) intitled in Equity only to an Estate for Life in the mortgaged Premises, by force of

of the pretended Marriage-Articles of the 21st of January, 1667: And therefore the Court of Chancery shou'd not have directed the Issue before-mentioned; but ought to have directed an Issue, to try whether the said *William Nagle* had notice of the said Marriage-Articles before either of the said Mortgages were made or assigned to him. 2. For that the Lord Chancellor of Ireland refused to stay the Hearing of the original Cause, till the Defendants in the Cross-Cause had put in their Answers; and for that, the Depositions taken in the Cross-Cause were suppressed and the *Appellants* Motion, on the 10th of June, 1726, to make use of those Depositions in the original Cause, was not granted; 3. For that the *Appellant* ought not to be affected or charged with the first Mortgage, in regard (as is vainly pretended) the same was discharged by the said *Bradley's* Release; and consequently the Second Mortgage for Two hundred and fifty Pounds was long since satisfied by the Payments made on Account of the Interest of the first Mortgage.

BUT the *Respondents*, notwithstanding these Pretences, are advised, and do humbly apprehend, that the said Orders, Decree, and Proceedings, are just and agreeable to the Rules of Equity, for the following, amongst many other,

R E A S O N S:

I. FOR that the *Appellant* never mentioned, or insisted on, the said Marriage-Articles in the original Cause; but, by his Answer, rely'd on an Actual Marriage-Settlement, the Reality of which was fairly tried by a Jury of the proper County, upon a Tryal directed meerly in favour of the *Appellant*, and acquiesced under by him; and tho' the *Appellant* attempted to support and maintain it by Witnesses; yet there appeared so many Marks of Suspicion on the Face of it, that the Jury, by the Judge's Direction, found a Verdict for the *Respondents*, without stirring from the Bar.

II. FOR that Two several Cross-Bills, brought by the *Appellant*, were dismissed for want of Prosecution; so that the Court had no Reason to delay the original Cause, on the *Appellant's* filing a Third Cross-Bill; and though the Depositions, first taken on the *Appellant's* behalf, in the Cross-Cause, were suppressed for manifest Irregularity, yet the *Appellant* was so far indulged by the Court, as to be allow'd to take out a new Commission, which he accordingly did; and by virtue thereof, examined his Witnesses *de novo*: And if any such Motion was made on the 10th of June, 1726, as by the *Appellant* is pretended, the same was justly refused to be granted, in regard it wou'd be the greatest Inlet to Perjury, to permit the Depositions, taken in the Cross-Cause, after two Hearings in the original Cause, to be afterwards made use of in that Cause.

III. FOR that the Release, or Escrow, signed by *Bradley*, was to attend the Event of the Arbitration; and if that Release had been of any Validity, it is not to be conceived or imagined, that the *Appellant's* Father, who must have known it, would have paid Interest for both the said Mortgages till his Death; and notwithstanding such Release, or Escrow, the first Mortgage continued in full Force, and as a subsisting Mortgage was well assigned for a valuable Consideration to the said *William Nagle*, under whom the *Respondents* claim, and that with the Privy and Consent of the *Appellant's* said Father, and without any Pretence of Notice of the Title now insisted on by the *Appellant*; so that the *Respondents* were, and still are, intitled to receive Interest, as well on the Mortgage for Two hundred Pounds, as on that of Two hundred and fifty Pounds.

WHEREFORE, the *Respondents*, who are fair Mortgagees, and have been for ten Years vexatiously harrassed, and kept out of both Principal and Interest, humbly hope, that your Lordships will affirm the said several Orders, and dismiss the Appeal with exemplary Costs, in respect of the said Vexation.

THO. LUTWYCHE.
N. FAZAKERLEY.

The Respondents CASE.

Augustine Nugent, Esq; Appellant.
Robert Power, and
Mary his Wife; and
Edmund Mande-
ville, and Ellen his
Wife; } Respondents.

To be heard at the Bar of the House of
LORDS, on Friday the 21st Day of
March, 1728.

By Power

Decree affirmed w. costs
Costs

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